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WE desire to call attention to the letter of "PELHAM," from London, which we elsewhere print. "PELHAM" is an able and veteran lawyer of Boston, who is travelling in England and on the continent. He travels with his eyes open—sees things through the spectacles of an American lawyer, and relates with force and grace what he sees. His observations upon the confiscation of monasteries in Italy are calculated to impress us with a profound sense of the advantages of constitutional guaranties like those we enjoy, and to reconcile us to the rule in the Dartmouth College case. We expect the pleasure of laying before our readers other letters from the same pen.

WE are indebted to Mr. Justice COOLEY, of the Supreme Court of Michigan, for an abridgment of a very able and important opinion of his, which we elsewhere print, on the power of the supreme court to award a mandamus against the governor of the state. We should gladly have published the opinion in full, but Mr. Justice COOLEY modestly cut it down, sending only that part which relates more immediately to the question in judgment. It will be seen that it places the question on the broad ground that the governor of a state is the best and final judge of the duties which attach to his official position, and that any attempt on the part of the judiciary to control his action contrary to his judgment, with reference to those duties, would not only be an invasion by one co-ordinate department of the government of the functions of another, but that it would also involve the court in the position of rendering a judgment which it would be without power to enforce.

The Right to Keep and Bear Arms for Private and Public Defence.

[CONCLUDED.]

We shall take leave of this subject by briefly considering whether the second amendment of the constitution of the United States is restrictive upon the states. This amendment provides that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Mr. Bishop suggests that, "though most of the amendments are restrictions on the general government alone, this one seems to be of a nature to bind both the state and the national legislatures; and doubtless it does." Of the same view was the Supreme Court of Georgia in Nunn v. The State, 1 Kelly, 243, where the question was discussed at considerable length, and where a statute of that state was held in part invalid because in conflict with this amendment. In the three Louisiana cases already quoted, the subject was discussed solely with reference to this amendment to the federal constitution, and it seems to have been taken for granted that it is restrictive upon the states. State v. Chandler, 5 La. An. 489; State v. Smith, 11 La. An. 633; State v. Jumel, 13 La. An. 399. So in the Arkansas case, The State v. Buzzard, 4 Ark. 18, all the judges appear to have understood this amendment as applicable to the states; and Judge DICKINSON supposes it to pertain to the power possessed by the general government of organizing, arming and disciplining the militia. He says this provision of the federal constitution "is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force."

This view of Judge DICKINSON contains the only plausible reason we have met with for supposing that this amendment is binding upon the states. The decisions of the Supreme Court of the United States, expounding the early amendments of the federal constitution, leave little room to doubt that none of the first ten amendments apply to the states, but that all of them are merely restrictive upon the federal power. Thus, in Barron v. The City of Baltimore, 7 Pet. 243, 247, it was held that an act of the Maryland legislature, which it was alleged deprived the plaintiff in error of his property without just compensation, was not void as being in conflict with the *fifth* amendment of the federal constitution. Chief Justice MARSHALL, delivering the unanimous judgment of the court, said: "The question presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The power they conferred on this government was to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes." This language would be equally decisive if applied to any of the first ten amendments. Again, in Fox v. The State of Ohio, 5 How. 410, 434, it is declared that the prohibitions contained in the amendments to the federal constitution "were not designed as limits upon the state governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the states and of their citizens." "Such, indeed," said Mr. Justice DANIEL, in delivering the opinion of the court, "is the only rational and intelligible interpretation which these amendments can bear, since it is neither probable nor credible that the states should have anxiously insisted to engraft upon the federal constitution restrictions upon their own authority—restrictions which some of the states regarded as the *sine qua non* of its adoption by them." So, also, it was held in Smith v. The State of Maryland, 18 How. 71, 76, that the provision of the *fourth* amendment of the federal constitution which prohibits the issuing of a warrant, "but upon probable cause, supported by oath or affirmation," had no application to the process of the state courts. Language equally decisive will be found in Withers v. Buckley, 20 How. 84, 90; Twichell v. The Commonwealth, 7 Wall. 321, and in other cases decided by the same court.

In view of these decisions of the only court whose interpretations of the federal constitution are binding and decisive, there would seem to remain no doubt that if the question should ever arise in that court it would be held that the second amendment of the federal constitution is restrictive upon the general government merely, and not upon the states, and that every state has power to regulate the bearing of arms in such manner as it may see fit, or to restrain it altogether.

The Right of Trial by Jury.

It will be remembered that at the last presidential election Miss Susan B. Anthony and some other women had the courage to offer their ballots at an election precinct in New York, and that they were accepted. It will also be recollected that Miss Anthony was prosecuted criminally, under some federal statute, for voting thus illegally, before the United States Circuit Court at Utica, New York, Mr. Justice HUNT presiding, and was convicted and sentenced to pay a fine. This fine she has petitioned congress to remit, and the judiciary committee of the house have made a report recommending that the petition be granted. They say that the presiding judge admitted evidence on both sides on the question of fact whether Miss Anthony did or did not vote, knowing that she had no right to do so, but that he afterwards withdrew from the jury altogether this question of fact, and ordered a verdict to be entered up upon his own decision, without allowing the question either to be argued or submitted to the jury, or the jury to pass upon it. The committee argue that "there certainly can be no graver question affecting the rights of citizens than this;" that the whole theory of trial by jury at common law consists in the fundamental maxim that no conviction can be had until passed upon by a jury of twelve peers of the accused; and that there can be no advantage in this jury system if a judge can order a verdict of guilty without any reference to the jury at all. They say that as a matter of law the judge cannot even order a verdict of acquittal, but can only direct the jury that in his opinion the case cannot be maintained upon the evidence presented, leaving to the jury to say whether they will accept his opinion. Therefore, "because the fine has been imposed by a court of the United States for an offence triable by jury, without the same being submitted to the jury, and because the court assumed to itself the right to enter a verdict without submitting the case to the jury, and in order that the judgment of the committee may, in the most signal and impressive form, mark its determination to sustain in its integrity the common-law right of trial by jury," the committee conclude their report by recommending a bill granting the prayer of the petitioner.

Referring to this report, one of our legal contemporaries suggests that "the committee seem to imagine that they have succeeded to the appellate jurisdiction of the house of lords." We do not concur in the spirit of this suggestion. Without expressing any opinion as to the propriety of the ruling of Mr. Justice HUNT (for we have no knowledge on which to base an opinion), yet we believe that if any judge has denied a person criminally accused the right of the verdict of a jury on the main issue of guilty or not guilty, it is the right and duty of the representatives of the people to express their disapprobation in a marked and decisive manner. Whatever may be said of the value of the verdicts of juries, the right of trial by jury is one which the people will not, and ought not, to surrender without resistance. Whilst we have no sympathy with that extravagant view of the right of juries to judge of the law as well as of the facts, which places juries above the judge, and advises them that they may make law to suit each particular case, yet we think that the final right of juries in criminal cases to resolve by their verdict the issues of law as well as of fact, ought not to be infringed. We lately saw an instance in a New York court of a judge falsifying his record by entering thereon a verdict as the verdict of a jury, they, at the same time, shouting "no! no!" That, however, was a civil case. If it had been a criminal case, the judge would have deserved impeachment.

We cannot part with this subject without quoting some admirable observations of Mr. Justice CAMPBELL, of the Supreme Court of Michigan, in the case of T. W. Hamilton v. The People, determined at the last (April) term of that court. Since the time of Judge GASTON there has been no American judge whose opinions in criminal cases better deserve reading than those of Judge CAMPBELL. In the case we are now adverting to, he is reported to have said:

"The power of juries in civil and criminal cases is the same in kind though different in degree. The practice of disregarding or relieving against wrong verdicts is largely of modern growth. Though they may be set aside, they cannot be reviewed or altered. And setting them aside as against law is a matter of discretion and not of right. An appellate court can only review the action of the judge, not that of the jury, and this, too, not by virtue of the old law, but by force of statutes which, though ancient, are yet later in origin than jury trials. The jury system is generally regarded as deriving one of its chief advantages from having the law applied to the facts by persons having no permanent offices as magistrates, and who are not likely to get into the habit of disregarding any circumstances of fact, or of forcing cases into rigid forms and arbitrary classes. It is especially important, where guilt depends on a wrong intent, to give full weight to every circumstance that can possibly affect it, and professional persons are constantly tempted to make the law symmetrical by disregarding small things. But it is necessary for public and private safety that the law shall be known and certain, and shall not depend on each jury that tries a cause. And the interpretation of the law can have no permanency or uniformity, and cannot become generally known, except through the action of courts. It may be fairly regarded as one of the best features of the jury system that the law, though interpreted by professional interpreters, can only be applied to facts through the understanding of ordinary men of average capacity, and usually including in this number some of very simple minds. By this process it is divested of all that would not be readily comprehended by all men. In this way over-nicety and technicality become less dangerous, if not absolutely harmless, and an apparent deviation in the verdict from the rules laid down is often no departure from the rules as supposed to be laid down.

"But if the court is to have no voice in laying down these rules, there can be no security whatever either that the innocent may not be condemned, or that society will have any defence against the guilty. A jury may disregard a statute as freely as any other rule, and a fair trial in time of excitement

would be almost impossible. All the mischief of *ex post facto* laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the protection of the law against unjust convictions quite as often as the public need it against groundless acquittals. Neither can be safe without having the rules of the law defined and preserved, and beyond the mere discretion of any one. We must construe the jury system like all other parts of our legal fabric, in the light of history and usage. It came into this country as a part of the common law, and it has been fixed by our constitution as a known and regular common-law institution. Like many of our best heritages from that source, we know what it is better than how it was devised, or (which is more probable) came into use without devising. We must look to the use as evidence of the law, and looking to that we find that the judge has always assumed to give the jury instructions upon the law. While there have been severe complaints and stern measures to secure them from his control on the facts, there has never been any attempt to abolish the practice of charging on the law. All the improvements in mitigation of the old system have gone upon the ground that the jury were expected to follow the instructions of the court. The introduction of reversed cases and criminal exceptions would be little short of an absurdity on any other theory. If there were any ground of complaint it would not be for wrong instructions, but for giving any charge at all. It is hard to deal with arguments which assume to qualify a system, and yet are not consistent with its uniform history. A jury system without a presiding judge who is something more than a mere puppet is not the jury system which we have inherited. If the charge is proper it can only be so because it is to be respected. If juries disregard it they may be free from personal risks, and in cases of acquittal their verdict is conclusive. But the power to do wrong with impunity does not make wrong right. The uniform practice and the decided weight of opinion is to require that the judge give his views of the law to the jury as authority, and not as a matter to be submitted to their review. And while we recognize the power of the jury to give wrong verdicts or disregard the law, usage and authority, warrant us in holding that such conduct would be an abuse of their discretion, which could only be palliated by such tyrannical and perverse instructions as their good sense should teach them could not possibly be true or just."

Railway Negligence—Consequential Damages.

SNEESBY v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Court of Queen's Bench, Westminster Hall, Hilary Term, 38 Victoriæ (February 3, 1874).

Negligence—Proximate and Remote Cause.—A herd of plaintiff's beasts were being driven at 11 o'clock P. M. along an occupation road to some fields. The road crossed a siding (side-track) of the defendants' railway on a level, and while the cattle were crossing the siding the defendants' servants negligently sent some trucks down an incline into the siding, which divided the cattle into two lots and frightened them, and they rushed away with the drovers after them. The drovers succeeded in recovering most of the cattle, but they were unable to recover six of them, which were ultimately found at between three and four A. M., lying dead or dying on another part of the railway; and it appeared they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level-crossing, had got into the garden through a defect of the fences, and so on to the line. There was no evidence as to when the rain had passed which ran over the cattle. *Held*, that, it being admitted that the defendants had been guilty of negligence which caused the drovers to lose control over the cattle, and it being also admitted that the plaintiff's men had done all they could to recover control over the beasts, and had not been able to do so before they were killed, their death was the consequence of the defendants' negligence, and the damage was not too remote.

Declaration that defendants were possessed of a railway and sidings, and of trucks for the conveyance of goods on the railway; that the sidings crossed an occupation road or level, and the defendants so carelessly and negligently managed their railway sidings and trucks that the trucks were suddenly driven down upon and against certain cattle of the plaintiff while they were lawfully passing over the crossing along the occupation road, without any warning having been given by the defendants' servants to the persons in charge of the cattle, whereby some of the cattle were divided from the persons in charge of them and were frightened and escaped to another part of the railway, and were killed by a passing train; and others of the cattle, being so frightened and divided from the persons in charge, ran along the occupation road to a place where the fences dividing the road from the railway were imperfect, and escaped through another fence on to the railway and were killed by a passing train.

Second count: That defendants were possessed of a railway, and were subject to the provisions of the railway clauses consolidation act, and certain cattle of the plaintiff were lawfully passing along an occupation road adjoining certain land taken for the use of the railway, and it was the duty of the defendants to maintain a good and sufficient fence between the roads and the land so taken, yet defendants, neglecting their duty, maintained so insufficient a fence that plaintiff's cattle escaped on to the railway through said fence and were killed by a passing train.

Pleas: 1. Not guilty. 2. That the cattle were not plaintiff's as alleged. 3. To second count; that the cattle were not lawfully passing over the said crossing. 4. To second count; that the cattle were not lawfully passing along said occupation road as alleged. 5. To second count; that the defendants were not subject, as to the said railway, to the railway clauses consolidation act as alleged.

Issue joined.

At the trial before the late Chief Justice BOVILL, at the Leeds Spring assizes, the following facts were admitted: The plaintiff, a cattle dealer, had sent a drove of twenty-nine fat beasts by railway for the Wakefield Wednesday market; on their arrival at Wakefield the night before, they were driven, about eleven, P. M., along an occupation road to a field where they were to be kept ready for market. The road crosses some sidings of the defendants' railway on a level, and while the cattle were crossing the sidings, the defendants' servants negligently, and without any warning to the persons in charge of the cattle, let some trucks run violently down an incline into the sidings. This separated the cattle into two divisions, and so frightened them that they escaped from the control of the drovers and rushed away. The drover went after them and succeeded in recovering most of the cattle, but six or seven of them were not found till between three and four A. M., when they were found lying dead or dying, on another part of defendants' railway having been run over by a train. Their tracks were traced from the sidings; and it appeared that they had gone along the occupation road about a quarter of a mile and had there got into an orchard and garden belonging to the defendants, the fences of which were in a defective state, and thence into the railway, where they were found. There was no evidence as to what time the train, which had run over the cattle, had passed.

On these facts the learned judge directed a non-suit, with leave to move to enter a verdict, the court to draw inferences of fact. A rule was obtained accordingly, on the grounds that the defendants were guilty of negligence, and also of a breach of duty in respect of the fences, and were liable for the death and injury to the cattle.

Price, Q. C., and *Beasley* showed cause. First, the death of the cattle was attributable to the defect of the fences. But the defendants were not bound to keep up the fences as against the plaintiff's cattle; first, because the railway clauses consolidation act was passed after the defendants' special act; secondly, because, if § 68 does apply, they were not occupiers of the garden and orchard, and, moreover, the defendants were not bound to keep up the fences as against the public. Manchester, Sheffield etc., Ry. Co. v. Wallis, 14 C. B. 213; Dawson v. Midland Ry. Co., Law Rep. 8 Exch. 8.

[QUAIN, J., referred to Booth v. Wilson, 1 Barn. & Ald. 59, and Ellis v. London and Southwestern Ry. Co., 2 H. & N. 424; 26 L. L. (Ex.) 349.]

Secondly, the defect of the fences was the proximate cause of the damage, and the damage was too remote from the defendants' negligence. There was a considerable lapse of time between the time when the cattle were frightened and when they were run over.

[BLACKBURN, J.—There was no evidence as to when the train passed which did the mischief. However, on the facts presented to us, we must take it that there was no negligence on the part of the drovers in looking after and endeavoring to recover the cattle. This is the case of a tort, but it is somewhat analogous to the case of insurance; and when a ship is taken out of control of the crew by a peril insured against, and is afterwards destroyed by another cause, still there is a total loss for which the underwriter is liable. The loss here is the same as if the cattle had fallen into an unfenced quarry.]

Lawrence v. Jenkins, Law Rep. 8 Q. B. 274, will no doubt be relied upon by the plaintiff; but in that case and the cases cited in it, the death of the cattle was directly attributable to the negligence in not keeping up the fence.

Field, Q. C. (*J. W. Mellor* with him), in support of the rule. If it be admitted that the plaintiff's drovers used due diligence in endeavoring to recover the cattle, and could not do so before the accident happened to them, the case is really not arguable; for then the negligence of the defendants' servants was the proximate cause, and the damage the natural result of the cattle being frightened. In addition to Lawrence v. Jenkins, Law Rep. 8 Q. B. 274, and the other cases already referred to—Anonymous, 1 Vent. 264; Powell v. Salisbury, 2 Y. & J. 391; Lee v. Riley, 18 C. B., N. S., 722; 34 L. J. (C. P.) 212, and Hill v. River Co., 9 B. & S. 303, may be cited. The last case is directly in point. There the defendants negligently allowed the escape of water which frightened the plaintiff's horses, so that they started on one side and upset the plaintiff's carriage into a ditch which had been negligently left unfenced by a third person; and it was held that the defendants' negligence was the proximate cause of the damage. But, secondly, the defendants were liable under § 68 of 8 Vict. chap. 20, for not keeping up the fence of the orchard and garden. [He was then stopped by the court.]

BLACKBURN, J.—I am of opinion that the rule must be made absolute. The facts seem to be that, by what is admitted to have been negligence on the part of the servants of the company, the cattle of the plaintiff, as they were crossing the railway on the level, were frightened and scattered, so that for a time the plaintiff's drovers lost control of all of them; they recovered the chief part of the cattle, but some were found killed on another railway. It happens that this was also the defendants' railway; and it appears that the cattle got on to the railway through a defect in the fence of a garden or orchard belonging to the defendants; but, from the nature of the accident, it seems to me that we may treat the case as if it had been the railway of some other company, or as if the cattle had fallen down an unguarded quarry. The question is, are the defendants, whose negligence drove the cattle out of the custody of the plaintiff, liable for their death, or is the damage too remote?

No doubt the rule of our law is that the immediate cause, the *proximate cause*, and not the remote cause, is to be looked at; for, as Lord Bacon says, "it were infinite for the law to judge the causes of causes and their compulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bac. Max. Reg. 1. The rule is sometimes difficult to apply; but in a case like the present this much is clear, that so long as the want of control of the cattle remains without any fault of the owner, the *causa proxima* is that which caused the escape, for the consequences of which he who caused it is responsible. Suppose, for instance, in former times a reclaimed falcon were frightened, the natural consequence would be that it would be lost altogether, and the person who negligently frightened it would be liable. The natural and proximate consequence was that it could not be got back at all. So, if you have lost control of cattle and cannot get them back under your control till they have run into danger and are killed, the death is a natural consequence of the negligence which caused you to lose control of them. It is the most natural consequence of cattle being frightened, that they should go galloping about and get into a dangerous position, and, being in the neighborhood of railways, should get on the line and be run over by a passing train, whether that of the defendants or not is immaterial. When once it is established that the cattle were driven out of the control of the plaintiff by the defendants' negligence, and that the control could not be recovered till they were killed, which was the natural consequence of their being uncontrolled, the liability of the defendants is beyond dispute. Lawrence v. Jenkins, Law Rep. 8 Q. B. 274, seems directly in point. The other cases, when looked into, do not go quite so far; but on principle there can be no doubt that the defendants are liable.

QUAIN, J.—It is well established that a person is liable for all the consequences of his wrongful act; of which the well-known case of Scott v. Shepherd, 2 W. Bl. 892, 1 Smith, L. C. 417, is an instance, where a squib, having been thrown into a crowd, and having been hastily thrown away by two other persons and ultimately injured the plaintiff, the wrong-doer, the original thrower, was held liable. So, when the plaintiff's cattle got through a defective hedge, which the defendant was bound to keep in repair, and were killed, in one case by falling into a pit, and in another by the falling of a haystack upon them, the defendant was held liable. Here the defendants' porters, who were responsible for the proper management of the sidings and level-crossings, are the persons doing the illegal act, the consequence of which was the escape and death of the cattle. In a case of contract the question is very different. In tort the defendant is liable for all the consequences of his illegal act where they are not so remote as to have no connection with the act, as by the lapse of time, for instance. Applying that to the present case, I think the damage to the cattle was not so remote from the injurious act as not to be the natural consequence of the act. The injurious act was the negligence of the defendants' servants in allowing trucks to be suddenly shunted across a level-crossing at eleven o'clock at night, without any warning, so that the plaintiff's cattle were frightened. The place was very dangerous from the numerous branch railways, and they having escaped from the plaintiff's control, got on to one of the railways and were killed on the same night. These circumstances, I think, bring the case within the rule, and the death of the cattle was not so remote from the negligence of the defendants as to render the damages not recoverable.

ARCHIBALD, J.—When the facts are understood there can be no doubt as to the application of the rule that a wrong-doer is liable for all the consequences of his wrongful act. The defendants had been guilty of a wrongful act, and the important fact (which it appears at the trial was conceded) is that, although all was done that could be done, it was impossible for the drovers to regain control of some of the cattle before they were killed. The natural conse-

quence of the cattle being frightened was that they should stray, and, so straying in the neighborhood of a railway, should get on to it, and, so lying down or remaining on it, should be run over by a passing train. Therefore, all is referable, as the proximate cause, to the original negligence of the defendants' servants.

RULE ABSOLUTE.

Mandamus against the Governor of a State.

THE PEOPLE *ex rel.* SUTHERLAND v. JOHN J. BAGLEY, GOVERNOR OF MICHIGAN.

Supreme Court of Michigan, April Term, 1874.

Hon. B. F. GRAVES, Chief Justice.
" J. P. CHUSTIANCY, }
" J. V. CAMPBELL, } Judges.
" T. M. COOLEY, }

1. **Mandamus against Governor of State.**—The governor cannot be compelled by mandamus to perform an official act, even though private rights of property may depend upon it. And this is so whe her the duty to perform the act is imposed by the constitution or by statute.

This was a petition for an order to show cause why a mandamus should not issue to compel the governor to issue his certificate that the contractors for the construction of the Portage Lake and Lake Superior canal had completed the same according to contract, and were consequently entitled to the land donated to the state by the general government for its construction. The governor appeared by the attorney-general, and raised the question of the jurisdiction of the court.

Judge COOLEY delivered the opinion of the court. After examining the particular case, and showing that it was doubtful under the law if the act to be done was not confided exclusively to the judgment and discretion of the executive, the court proceed to say that they are not disposed to decide the case on any narrow ground, if a broad general principle underlies all cases in which a remedy of this nature is brought against the governor, and would require the same decision in all. That such a principle is to be found in the apportionment of the powers of government between three distinct, co-ordinate and independent departments of government, is held to be clear. Each is independent in its constitutional action, except as the checks and balances estab lished for the protection of liberty make each a restraint upon the others. Having presented and illustrated that at some length, the court say:

But it is said that the act required of the governor is not to be done in the performance of an executive duty which the constitution imposed upon him, but is in its nature a ministerial act, provided for by statute, and which might with equal propriety have been required of an inferior officer, who beyond question could have been compelled by mandamus to take the necessary and proper action in the premises. And the question is put with some emphasis whether, where individual interests depend upon the performance of ministerial action to which the party is entitled of right, the question whether there shall be a remedy or not can depend upon the circumstances that in the particular case the ministerial action is required of a superior officer, when there is no reason in its nature why it might not have been required of an inferior.

A view similar to this has been taken in some cases, and the courts have undertaken to decide what are and what are not properly executive duties, and to assert a right to control the governor's action in some cases, while admitting their want of jurisdiction to do so in others. The State v. The Governor, 5 Ohio St. 528; Bonner v. Pitts, 7 Geo. 473; Cotton v. The Governor, 7 Jones, N. C. 545; Chamberlain v. The Governor, 4 Minn. 309; Pacific R. R. v. The Governor, 23 Mo. 353; Magruder v. The Governor, 25 Md. 173. These cases, for the most part, are rested upon the *dictum* of Chief Justice MARSHALL in Marbury v. Madison, 1 Cranch, 137, that one of the heads of departments in the federal government might be compelled by mandamus to perform a mere ministerial duty; a *dictum* which cannot be understood as expressive of the opinion of that eminent judge that the president was subject to the like process, but which is wholly inapplicable to a case like the present unless it goes to that extent, for it cannot justly be claimed, where federal and state governments have been formed, so far as distribution of power is concerned on the same general plan, that the executive of the Union can claim immunity from judicial process any more than the governor of one of the states. In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction, and as regards such an officer we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance. When the head of a department acts as the mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the courts than the chief executive himself; but where a ministerial act is required to be done by him independently of the executive, though in a certain sense he is an executive officer, it would be as idle to dispute his responsibility to legal process as it would be to make the same claim to exemption on behalf of an officer entrusted with similar duties of a lower grade. This is emphatically the case under the constitution of this state, which provides for the election of state and inferior officers alike by the people, and makes the chief officers of state below the governor as independent of his control in the performance of their duties as are the officers of the counties or of the townships.

But when duties are imposed upon the governor, whatever be their grade, importance or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of state, or a sheriff of a county, or other inferior officer, and that inasmuch as in case it had been so imposed there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority and duty to the governor is made either by the people in the constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior officer, and consequently, for the purpose of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government.

There is, as to all the authority specially confided to the governor, whether by the constitution or the laws, no safe or logical doctrine but this: that reasons of a conclusive nature must be presumed to have been found requiring the particular authority to be confided to the chief executive as one properly and peculiarly, if not exclusively, pertaining to the department which he represents.

It is not attempted to be disguised on the part of the relators that any other course than that which leaves the head of the executive department to act independently in the discharge of his duties

might possibly lead to unseemly conflicts, if not to something worse, should the courts undertake to enforce their mandates and the executive refuse to obey; but it is insisted that no such considerations are admissible in the present case, in which the governor, though questioning our jurisdiction, professes a willingness to be governed by our decision upon it. The decision of this question, however, is to be a precedent in the state, and no voluntary appearance and no concession which may be made is to be allowed force to induce us to assert a jurisdiction which, though it may be useful in this case, would threaten conflict and danger in future controversies. Orders in these cases can only be enforced by process for the punishment of contempts of court, and it is conceded that the governor might submit or not, at his option, so that our decision in effect could be only advisory. And while we should concede, if jurisdiction were plainly vested in us, the inability to enforce our judgment would be no sufficient reason for failing to pronounce it, especially against an officer who would be presumed ready and anxious in all cases to render obedience to the law, yet in a case where jurisdiction is involved in doubt, it is not consistent with the dignity of the court to pronounce judgments which may be disregarded with impunity, nor with that of the executive to place him in position where, in a matter within his own province, he must act contrary to his judgment or stand convicted of a disregard of the laws.

But it is said that this conclusion will leave parties who have rights, in many cases, without remedy. Practically there are a great many such cases, but theoretically there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict or an erroneous ruling of a judge, and though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the state may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and where that decision has been made it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action which under the constitution and the laws depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision.

The cases of Hawkins v. The Governor, 1 Ark. 570; State v. The Governor, 25 N. J. 331; People v. Bissell, 19 Ill. 229; Dennett, Petitioner, 32 Me. 510, and Mauran v. Smith, 8 R. I. 192 which reach the same conclusion, are so full and satisfactory in their reasoning that we might have deemed it proper to dismiss the case with a simple reference to them if there had not been opposing decisions which are supposed to detract from the weight of their authority. Those opposing decisions, as we think, have not been sufficiently observant of the distinction between the governor as being himself a distinct and independent department of the government, and those administrative officers which, though clothed with important powers, must be subject in the performance of their duties to the regulation, direction and control of the legislature, executive and judiciary, according as the intervention of one or the other in a particular case shall become proper or necessary.

For the reasons stated we must decline to make any order to show cause.

MANDAMUS REFUSED.

Removal of Causes from State to Federal Court.

VERNON K. STEVENSON, PLAINTIFF IN ERROR, v. MARY McDOUGALL WILLIAMS, WIFE OF WILLIAM VON PHUL, AND WILLIAM VON PHUL.

Supreme Court of the United States, No. 212, October Term, 1873.

1. **Removal of Causes from State to Federal Court—Final Judgment.**—Under the act of March 2, 1867 (14 Stats. at Large, p. 558), the application for the removal of a cause from a state court to the federal court must be made before the *final judgment* in the state court of *original jurisdiction*; it cannot be made in the state appellate court.

In error to the Supreme Court of the State of Louisiana.

Mr. Justice FIELD delivered the opinion of the court.

The application of the appellant for the removal of the suit from the Supreme Court of Louisiana to the Circuit Court of the United States was made too late, and was properly refused on that ground.

The act of congress of March 2d, 1867 (14 Stat. at Large, 558), under which the removal was asked, only authorizes a removal where an application is made "before the final hearing or trial of the suit, and this clearly means before final judgment in the court of original jurisdiction where the suit is brought. Whether it does not mean still more—before the hearing or trial of the suit has commenced, which is followed by such judgment—may be questioned; but it is unnecessary to determine that question in this case.

After a final judgment has been rendered in the state court the case cannot be removed to the Circuit Court of the United States, and "there proceed," as the statute provides, "in the same manner as if brought there by original process," without setting aside the trial and judgment of the state court as of no validity. No such proceeding is contemplated by the act, and since the decision of Murray v. The Justices of New York, reported in 9th Wallace, legislation directed to that end where, at least, the trial has been by jury, would be of doubtful validity.

The judgment recovered by Stevenson against the succession of Williams appears to have been annulled on two grounds: 1st, that the notes on which the judgment was rendered were given for a loan of confederate money; and 2d, that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the president forbidding commercial intercourse with the enemy.

The first ground would not be deemed, in a federal court, sufficient to set aside a judgment rendered for the cash value, in national currency, of the confederate money, especially when, as in this case, the judgment was entered upon a stipulation with the executor of the estate for an extended credit. And the evidence in the record leads us to doubt whether the transactions detailed properly fall within the rule of public law or the proclamation of the president forbidding commercial intercourse with the enemy.

But the ruling of the state court in these particulars, however erroneous, is not the subject of review by us. It presents no federal question for our examination. It conflicts with no part of the constitution, laws or treaties of the United States.

Had the state court refused to uphold the judgment because of the provision in the constitution of the state, subsequently adopted, prohibiting the enforcement of contracts founded upon confederate money, a federal question would have been presented. That provision, however, although referred to, does not appear to have caused the ruling. The court only followed its previous adjudications that contracts of the character mentioned were invalid. West Tennessee Bank v. Citizens' Bank, 13 Wall. 432; Bethell v. Demaret, 10 id. 537.

JUDGMENT AFFIRMED.

—GOVERNOR DIX, of New York, has vetoed "an act to simplify and abridge the practice, pleadings and proceedings of the courts of this state."

Federal Court Practice—Taxation of Costs where the Cause has been Removed from a State Court.

HELENA WOLF v. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

United States Circuit Court, Eastern District of Michigan, April Term, 1874.

Before Hon. JOHN W. LONGYEAR, District Judge.

1. **Federal Court Practice—Taxation of Costs.**—A suit removed from a state court comes into the federal impressed with all the rights and liabilities of the parties as to costs which accrued or attached by the laws of the state while the suit remained in the state court. Acts of congress prescribing what costs may or not be taxed apply only to such costs as may accrue after the removal has become complete and the federal court is invested with jurisdiction. In taxing costs in such cases, the federal court will therefore administer the state laws as to all costs which accrued while the suit remained in the state court.

On the mutual application of the parties for directions to the clerk as to taxation of costs.

This cause was commenced in the circuit court for the county of Wayne, in this state, and after issue and one continuance in that court, the cause was removed to this court by the defendant, under and in pursuance of the acts of congress in such cases made and provided. After sundry proceedings had in the case in this court, unnecessary to mention here, the plaintiff discontinued her suit, and judgment was entered against her for costs to be taxed. The defendant now brings its bill of costs for taxation, in which are included items of costs accrued in the state court before removal to this court, amounting in the aggregate to $15, and $7.50 paid to the clerk of the state court for transcripts in making the removal. These items are objected to on behalf of plaintiff on the ground that there is no act of congress allowing such costs to be taxed in this court.

Mr. *D. C. Holbrook*, for plaintiff; Mr. *C. J. Walker*, for defendant.

LONGYEAR, J.—A suit removed from a state court comes into this court impressed with all the rights and liabilities of parties as to costs which accrued or attached by the laws of the state while the suit remained in the state court. Acts of congress prescribing what costs may or may not be taxed apply only to such costs as accrue after the removal has become complete and this court is invested with jurisdiction.

In the state court, in case of discontinuance, the defendant would be entitled by the state laws to all his costs made up to that time, and I think this court is bound, in case of removal to this court before discontinuance, to administer those laws as to all such costs which accrued while the suit remained in the state court.

No adjudicated case involving this exact question has fallen under my notice, but the cases cited below involve principles applicable to this question, and so far as they go, fully sustain the foregoing propositions. I am also informed by my brother Judge, WHITHEY, of the western district, that such has always been the uniform practice there. (See Ellis v. Jarvis, 3 Mason, 457; Field v. Schell, 4 Blatchf. C. C. 435; Gier v. Gregg, 4 McLean, 202; Ackley v. Vilas, 3 Ch. L. News, 73)

The clerk is therefore directed in this, and all like cases, to tax to the party recovering costs, all costs to which he would have been entitled under the state laws, accrued while the suit remained in the state court, and up to the time the suit was duly entered in this court.

ORDERED ACCORDINGLY.

—THE judgment of the New York Supreme Court in one of the suits that are known as the "ring case," The People v. Ingersoll, has been affirmed by the court of appeals. The court held that the county may maintain such suits, and not the state,

Correspondence—The Confiscation of Monasteries by Victor Emanuel as Viewed by an American Lawyer.

LONDON, May, 1874.

EDITORS CENTRAL LAW JOURNAL:—I am pleased with the administration of law in England. But perhaps before I tell you how and why, I ought to say I came here disposed to be pleased. I came from Italy, where with the law, at least such as it is, and so little of it as there is, I was not pleased; where the government seizes private property, sells it as its own, appropriates the proceeds to its own use, making no compensation to the owner; and where, when the owner seeks redress at law, he finds sitting in the judgment-seat only the subordinate of the wrongful taker, already committed and commanded to determine that his master has only taken his own, and that no compensation is due.

It was in 1861, I believe, that Victor Emanuel assumed the title of King of Italy. Since then, at different times, he has suppressed all the monasteries, except only the Armenian which is in the bay of Venice near the Adriatic shore, and is under the patronage of Turkey. The pretext for this suppression is that nothing was taught in these institutions but religion; that the mass of the people was kept in ignorance, and purposely so kept by the priests; that the demand was for a better and more general education, and that the only way to get it was by suppressing the monasteries. I do not believe the pretext to be true in point of fact, in the first place; in the second place, the conclusion does not follow, if it were true, and in the third place, if the facts of the pretext were true, and the conclusion did follow, they furnish no excuse for the conduct of Victor Emanuel.

Every American lawyer knows, of course, the claim and the argument under which, a dozen or so years ago, the property of the people of the Southern states was taken from them. It is true I never for a moment believed in that argument, but it was at least a claim in respect of which, as Mr. Justice MELLEN, of Massachusetts, used to say, "a noise can be made on the other side." And a noise, it will be remembered, was made; and they who blew the loudest and the longest horn prevailed. It was said there was precedent for it among states civilized. At any rate, the country, tired of noise and fighting, acquiesced, and the matter is now settled. But for the conduct of Victor Emanuel in respect to these monasteries, not now to speak of his acts in other respects, no such apology can be made. If, as the pretext admits, religion was taught in these monasteries, then to teach it they must have taught letters, and the connection between A B C and moral conduct I hold to be necessary and inseparable. I spend no time on this. Second, if it was competent to suppress these institutions, then it was competent to control and regulate them, and therefore it was not needful to destroy them, much less to rob them—which is what suppression means. Third, if, as predicated, the public good required that these institutions should be discontinued, then there was no excuse for taking the property belonging to them without compensation. It is said these monasteries had been, to some extent, publicly endowed. Suppose that were true, how does it affect the title? Must not that depend upon the terms of the grant? It was thus in great part that the foundation of Harvard College was laid. Thus in part it has been supported. But the money granted by the state, and the buildings that have been built on the college-grounds by individuals, are equally the property of the president and fellows. And what would be said if, under the pretext that the public good required that the college should be suppressed and the lands and buildings should be taken for public use, the lands and buildings belonging to the college were taken and sold by the state and the proceeds applied to support the governor's household, and an army miscalled a peace establishment, and no compensation made to the college? The American constitution shows how well it has always been understood in our country that every individual is to be protected in the enjoyment of his property, not only against his fellows, but against the thing called government. The constitutions of Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Kentucky, Tennessee, Ohio, Indiana, Illinois and Missouri, not to speak of others, respectively provide in terms that private property shall not be taken for public use without just compensation. And the constitution of the United States has a like provision. If it is said there is no such provision in the constitution of Italy, I may answer it is quite time so plain a principle was recognized there.

Thus, you see, I was disgusted with what passes for law in Italy, and happy to find a contrast here. But I must add, I like the English system

and practice better than our own; how, and in what respects, I will tell you in another letter. PELHAM.

The Married Woman's Law of Alabama—When the Federal Courts will Follow the State Courts.

GREENSBORO, ALA., June 9, 1874.

EDITORS CENTRAL LAW JOURNAL:—In the number of CENTRAL LAW JOURNAL issued May 28, 1874, you publish an interesting opinion of Judge WM. B. WOODS, rendered at Mobile, Alabama, in the case of Nannie C. Mitchell v. J. B. Lippincott & Co. The question raised was the validity of a certain mortgage executed by Mrs. Mitchell and her husband on the 17th February, 1869; and it was contended by the attorneys for the mortgagees that, at the date of the execution of the mortgage, the language used in the deed, by which the lands mortgaged were conveyed to Mrs. Mitchell, created in her "a contract separate estate," and that she could mortgage them according to all the decisions of the Supreme Court of Alabama prior to that time. The case of Bibb v. Pope, 43 Ala. 190, decided in January, 1869, was referred to as the earliest decision reversing the former rulings, and holding that all conveyances made directly to a married woman in Alabama conveyed to her a "statutory separate estate" irrespective of the language used. But that question was not raised or decided in Bibb v. Pope. The sole question decided in Bibb v. Pope was that a married woman in Alabama, owning a statutory separate estate here, could not mortgage it. No question was made as to the character of Mrs. Pope's estate; it being conceded to be a "statutory separate estate," as the deed to her contained no words which would have excluded her husband's marital rights by the common law. The earliest decision by the Supreme Court of Alabama holding that all property conveyed directly to a married woman became her statutory separate estate, regardless of whatever words of exclusion the grantor used in the deed, was that of Glenn v. Glenn, decided January term, 1872, and reported in 47 Ala. 208–209.

In Alabama a married woman, owning a separate estate secured to her by contract, may mortgage it. Such has been settled by our supreme court in Warfield v. Ravesies and Wife, 38 Ala. 521, and other cases. Then if, as decided by the Supreme Court of the United States in Gelpke v. Dubuque, 1 Wall. 206, and Olcott v. Supervisors, 16 Wall. 690, the construction placed by the Supreme Court of Alabama upon this Alabama statute (creating in married women a statutory separate estate), at the date of the mortgage, declaring the land to be Mrs. Mitchell's "contract separate separate estate," or, to speak more accurately, that such language as that used in the deed to her conveyed to her a contract separate estate, became a part of her contract which no subsequent reversal of those decisions could affect; then why, in a suit brought to enforce that mortgage, would not both the state and federal courts be bound to give it that construction, irrespective of subsequent decisions overruling the former ones? It was emphatically so asserted as a correct proposition of law in Gelpke v. Dubuque, and reaffirmed in Olcott v. Supervisors, *supra*, that the rule of construction at date of the contract must govern in ascertaining its validity; and if that is a correct announcement of the law, it is as binding upon a state court as on a federal court. And if the case of Mitchell v. Lippincott had been pending in a court of the state of Alabama, its decision therein, under the influence of the principle so declared in 1 and 16 Wallace, would have been controlled by the construction of the statute at the date of the mortgage, and not by those made since. But whilst it is true that the United States courts follow the decisions of state courts in the construction of their own constitutions and laws, yet "*where those decisions are in conflict*, this court must determine between them," is the language of Judge TANEY, delivering the opinion of the court in the case of Ohio Life Ins. Co. v. Debolt, 16 How. 431. This law applies with equal force to contracts respecting real estate as it does to personal property.

The authorities cited and the reasoning of Judge WOODS fail to draw our minds to the conclusion he reached. His conclusion and judgment is the same as that which would have been the legitimate conclusion arrived at by following the dissenting opinion of Judge MILLER in the case of Gelpke v. Dubuque in 1 Wallace. SUBSCRIBER.

The Obligation of a Bailee for Hire.

An interesting and important judgment has been delivered in the Court of Queen's Bench in England, by BLACKBURN, J., in Searle v. Laverick, L. R. 9 Q. B. 122, which throws a considerable amount of light on the celebrated judgment of Chief Justice HOLT in the leading case of Coggs v. Bernard. In that case bailments are divided into classes, in each of which different degrees of liability are attached to the bailee. The fifth of these classes, *locatio operis faciendi*, or where there is "a delivery to carry or otherwise manage for a reward to be paid by the bailee," is again subdivided into two divisions—the first, where there is a delivery to one who exercises a public employment, in which case a bailee is bound to answer for the goods at all events; and the second, where the delivery is to a private person, who is only bound to take reasonable care. A question arose in Searle v. Laverick, as to under which of the subdivisions of the class of bailment, *locatio operis faciendi*, the case fell. The defendant was a livery stable keeper; he entered into a contract with a builder, who was not his servant, to erect in his yard a building, of which the lower part was to be a shed for the reception of carriages, and the upper part was to be used for other purposes. Before the upper portion of the building was completed, the plaintiff brought to the defendant two carriages to keep for him, a charge being made for so keeping the carriages. While the contractor's workmen were still in the upper portion of the building, it was blown down by a high wind, and the carriages were damaged. The contractor employed for the purpose of building was not denied to be one whom a careful and prudent person might trust, and there was nothing to show that the defendan had any knowledge of negligence on his part. The plaintiff, at the trial, offered evidence that owing to the neglect of the contractor and his workmen, the fall of the building took place; but this was refused by the learned judge who tried the case, on the ground that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to use ordinary care in keeping the carriages, and if in employing the builder he made use of such care as an ordinary careful man would use, he was protected. The plaintiff was, in consequence, non-suited on a motion for a new trial; the full court, after a careful review of the authorities, upheld this decision. The court held it to be established law, by the custom of England, that the extreme liability making the bailee an insurer is confined to carriers and inn-keepers. It would seem, by analogy to the Roman law, from which the English law on the subject is avowedly taken, that the case of stable keepers should be placed on a footing with inn-keepers and carriers. The language of Lord HOLT is general, and applies to all who exercise a public employment. The Prætor's Edict (Dig. lib. iv. tit. ix.), *nautæ caupones stabularii ut recepta restituant*, expressly mentions stablemen. The reason given by Lord HOLT for the division tells, in our opinion, rather against the interpretation now put on it by the court: "The true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases (*i. e.* the carrier and inn-keeper, but *not* the livery stable keeper, according to the present decision), by reason of the necessity of the thing." We confess we are at a loss to perceive the necessity existing in the case of the carrier and inn-keeper, which does not exist with equal force in the case of the livery stable keeper. At any rate there did not appear to exist any distinction between the cases, in the opinion of Ulpian, who, in the clearest and most express manner, mentions livery stable-men. The Prætor's Edict declared that if shipmasters, inn-keepers and stable keepers did not restore what they had received to keep safe, he would give judgment against them. The reason assigned for this by Ulpian is that "it is necessary to place confidence in such persons, and to commit the custody of things to them; that no person ought to complain of the severity of the rule, for it is in his own choice to receive the goods of other persons or not, and unless the rule was thus established, an opportunity would be afforded them to combine with thieves against those who trusted them; whereas they have now an inducement to abstain from such combinations." These reasons, if read in connection with the general principle on which warranties are to be assumed, laid down in Redhead v. Midland Railway Co., L. R. 4 Q. B. 392, "that they are, for the most part, founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as of the party to whom it is supposed to be given," would strongly point to the conclusion that stable keepers should be classed in the same catagory with inn-keepers and carriers.

We presume there could be no doubt of this extreme liability being applicable in the case of an inn-keeper, who also kept a stable, and took

charge of the animals and vehicles of those who frequented his house. This is distinctly stated to be the law by Pothier (*Du Contrat de Depot*, 80), where he states "that stable servants must be judged to be appointed by inn-keepers to take charge of horses and vehicles of travellers," by which the inn-keeper is rendered liable. What difference can there be between such a case and a case where the stable keeper does not provide lodgment for "man and beast," but for "beast" alone? All the cases quoted—both those decided in this country and the *dicta* of foreign jurists—would seem to indicate that a tolerably wide margin should be allowed by a judge in deciding in the case of what trades a warranty is to be presumed. The case quoted in the judgment from Pothier (*Du Contrat de Louage*, Nos. 118, 119, 120) is a strong authority on this point. After laying down that where a person, who lets a thing for hire, knows of a defect in the thing which makes it unfit for the purpose for which it is let, he is responsible for damages. And although he does not actually know it, that if the circumstances are such that he ought to have had a suspicion of it, and make an enquiry about it, and he does not either enquire, or inform the hirer, so that he may enquire for himself, he is liable; but if the latter follows a trade which makes it his duty to know whether the thing has faults or not, he is liable, without proof that he did not know. He puts as an example the case of a cooper who supplies wine casks made of bad wood, so that they leak. Surely, if "the profession of the cooper binds him to know the quality of the goods he used, and to supply none but of a good quality," it cannot be contended that the profession of a livery stable keeper, where a person holds himself out to the public as willing to undertake the charge of property of a nature requiring the utmost care, does not bind the bailee to know of the quality of shelter which he is bound to provide to his property. The plaintiff's counsel relied mainly on Redhead v. Midland Railway Co., L. R. 4, Q. B. 392, and Francis v. Cockrell, L. R. 5, Q. B. 184, which establishes that a person who lets sittings in a temporary stand, built for the reception of spectators at a race, is under an obligation as to the sufficiency of the stand. But the court, while intimating a desire not to draw too fine distinctions between the cases, held that that case was clearly distinguishable from the present, and that there was no authority to establish that a warranty must be applied in the present case. It seems to us that the court being, in its own language, at liberty, so far as authority goes, to apply the principles to the case, and see if any warranty or obligation should be implied, in deciding as it did, rather overlooked the true principles, as laid down by the most eminent of foreign jurists, fortified by the direct *dictum* of so great an authority as Ulpian.—*Irish Law Times.*

Bona Fide Purchasers Without Notice.

The case of Caballero v. Hentz, which came up on appeal on the 11th March, from the master of the rolls, before the lords justices, seems to establish a new principle in relation to the rights of that well protected person, the *bona fide* purchaser without notice. A brewer sent his agent to bid for property, described as in the possession of certain tenants, and producing £30 a year. At the sale, however, it appears that these tenants were under-tenants of a lessee of the vendor, who held the whole property for a lease, of which nine years were unexpired, at a rent of £20. The lease was read at the sale, but it was not referred to in the abstract sent to the purchaser. A bill was filed for specific performance, but it was held by the master of the rolls, and his decision was affirmed, that the purchaser was not bound by the unauthorized act of his agent, and that he had not received constructive notice of the lease. The two cases most relied on by the plaintiff's counsel were those of Daniels v. Davidson (16 Vesey, 249) and James v. Litchfield (L. Rep. 9 Eq. 51; 21 L. T. Rep N. S. 526); the former of which may be looked upon as much shaken in authority, and the latter overruled. The point decided in Daniels v. Davidson was, that the possession of a tenant is notice to a purchaser of the tenant's interest, created by an agreement to purchase from his landlord; and it was intimated in the judgment of Lord Eldon that generally notice of occupation was notice of the terms of occupation. And the case of James v. Litchfield lays down that rule to its full extent. It is true that in the present case complications existed which were absent from the earlier ones. The question of principal and agent was involved, and the statement in the particulars of sale that the property brought in a certain annual rental, whereas it produced, in fact, considerably less, had great influence upon the decision. But there are statements in the judgment of Lord Justice James which go much further; so that, whereas under the older decision the usual rule was that notice of possession was notice of the terms under which the possession was held, the law may now be taken as settled, if the decision of the lords justices is maintained, that a purchaser may safely assume the tenantcy of an occupant to be from year to year or at will, unless he is distinctly informed of the contrary. After stating his indisposition to follow the *dicta* in James v. Litchfield (*ubi sup.*) the lord justice said: "If there is anything in the nature of the tenancies which affects the property sold, it is the vendor's duty to inform the purchaser of it, and he is not afterwards entitled to say, 'Oh, yes, but you ought to have gone and enquired.'" This decision seems to place the law upon a satisfactory basis, and while justly relaxing the stringency of the rule of *caveat emptor*, to discourage the fraudulent concealment of facts material to the property on the part of vendors.—*Irish Law Times.*

Negligence—Carriers—Passenger's Baggage.—We learn from the New York papers that in the suit of Thomas E. Fairfax v. The N. J. Central and Hudson R. R. Company, which was tried in the Superior Court of that city, plaintiff purchased in Montreal tickets of the Grand Trunk R. R. to New York. He left for New York October 8, on the route of the Rensselaer and Saratoga line to Albany, and thence by the People's line of steamers to New York. The tickets were for that route. He had seven pieces of luggage checked by the same route. The Rensselaer and Saratoga baggage check-master delivered them to the Hudson River R. R. at Troy, and the baggage arrived at the depot in New York October 9. Plaintiff got to New York October 11 by steamer, and next day demanded his baggage at the Hudson River R. R. depot, when it was found one piece, a valise, had been stolen. He brought suit for damage, and the jury decided in his favor on the ground that there was an arrangement by which defendant conveyed his luggage, and he called for it within a reasonable time, but the general term, through Judge Spier, reversed the judgment, on the ground that the relations of carrier and passenger, which is the basis of liability for baggage, did not exist, and that the Grand Trunk Road, by its agent the Rensselaer, must be held responsible for the deviation of route by the baggage, and that the railroad which carried it were not insurers and had exercised ordinary care, and that the plaintiff ought to have called for the baggage earlier, notwithstanding that his ticket gave him a month to delay *en route*.

Book Notice.

The Case of the Virginius Considered with Reference to the Law of Self-defence. By George Ticknor Curtis. New York: Baker, Voorhis & Co., 66 Nassau street. London: Trubner & Co., 57 and 59 Ludgate Hill. 1874.

On the first appearance of this interesting pamphlet we were attracted by its title, and have read it in connection with a well-written article on "The Virginius Case" in the January number of the Law Magazine and Review, and also in connection with an extremely acute and forcible article on the same subject in the April number of the American Law Review. The English writer argues the American side of the case with much vigor and considerable learning, and although we detect in it some slight errors, such as an allusion to *Chief* Justice Story and to Dr. *Woolsely*, yet when we recollect that all that the best writer can hope to do is to reduce such errors to a decent minimum, they do not, on the whole, diminish our respect for the writer. It is proper to note, however, that the argument of this writer is almost exclusively devoted to an attempt to show that the enterprises in which the Virginius was engaged were not *piratical*. But this argument assumes that the Virginius was a regularly documented American ship, entitled to fly the American flag, and these premises having been destroyed by subsequent evidence, the whole argument falls to the ground. The only trouble with it is that it was written a few days too soon. Whilst this and other English lawyers have taken up the cudgel in our behalf, the more just but less pleasing task has devolved upon our own jurists of showing that in that memorable controversy, so far as the right of the Spanish admiral to seize the Virginius on the high seas was questioned, Spain was right and we were wrong.

Starting with the question of the ownership and national character of the Virginius, it now appears beyond all controversy or shadow of doubt—

1. That she was not, at the time of her seizure, owned, in whole or in part, by any American citizen, but that she was wholly owned and controlled by citizens of Spain, and was used by them for the unlawful purpose of promoting a domestic insurrection in the island of Cuba, a portion of the territory of Spain.

2. That her American register was void for two reasons: (1) because it had been obtained by an American citizen through fraud and perjury; and (2) be-

cause the bond required by law to entitle her to a registration had not been perfected.

3. That her general character and status were well known, not only to the Spanish military and naval authorities in and about Cuba, but also to our own naval officers cruising in those waters, and to our commercial agents in those and adjacent ports. The evidence that her character and status were thus generally and well known, consists in the notorious fact that previously to her capture she had succeeded in landing two hostile cargoes on the shores of Cuba. The second of these successful expeditions is remarkable from the fact that, wholly and notoriously controlled as she was by Spanish subjects, and loaded with arms and munitions of war designed to assist certain Spanish citizens to make war upon the Spanish government and other Spanish citizens, and notified by a Spanish naval officer of her real character, who earnestly solicited that she might be taken to an American port to have her true character adjudicated, the commander of an American gunboat was, nevertheless, not ashamed to convoy her out to sea from a Central American port, thus fairly rescuing her from the clutches of a Spanish cruiser, and sending her out under the sanction and protection of our flag, *to land her second hostile expedition upon Spanish territory*, which she immediately did. Such a dishonest breach of comity towards a friendly nation is calculated to make every American hang his head in shame, and goes far towards justifying the assertion of the Cuban journals that the final loss of that vessel involved another instance of Punic faith on our part—that instead of succumbing off Cape Hatteras to her own weak condition and the perils of a stormy sea, she was scuttled and sunk to avoid the inevitable consequence which would have followed the determination by an American court of her real character, namely, her re-delivery to Spain.

The Cuban insurgents not being recognized by any respectable power as belligerents, the Virginius, though owned by Spanish citizens, was without any national character. She was not entitled to fly the flag of any nation, but was a sort of *nullius filia* upon the high seas. She was, to all intents and purposes a Spanish vessel, engaged in unlawful enterprises against the Spanish government, and as clearly liable to seizure by a Spanish cruiser on the high seas as any American merchantman at sea is liable to be overhauled by an American gunboat. In reason and common-sense, her fraudulent register and the device of hoisting an American flag, her real character and ownership being known, could no more confer upon her immunity against seizure by a Spanish gunboat than the same devices could confer immunity upon a pirate cruising *animo furandi* against the commerce of all nations. The utmost obligation which Spain owed us was, her American character having been asserted by our government, to have that character adjudicated by an American court.

We cannot, of course, enter into an extended argument to enforce these views. They are amply enforced by Mr. Curtis and by the writer in the American Law Review. The question, then, being one which concerns simply the right of a Spanish man-of-war to seize upon the high seas a vessel owned and controlled by Spanish citizens, and engaged in treasonable and felonious enterprises against the Spanish government and people, it would seem that the right of self-defence does not become an important question in the case. The governing principle of the case relates rather to the right which every sovereign power possesses over its own subjects, whether within its own territories or upon its vessels on the high seas. And it would seem to be only upon the supposition that her fraudulent American register made her, *prima facie*, an American vessel, that the doctrine of self-defence has any relevancy to the case. Mr. Curtis, however, discusses the question at considerable length with reference to the law of self-defence. After fully explaining the character and ownership of the Virginius, and the *personal* jurisdiction of a nation over its subjects on the high seas, he says: "If it is true that national jurisdiction over the persons and property of subjects exists, for some purposes, wherever they are—and this is the real basis of the relations between a national vessel at sea and the nation to which it belongs—it follows that a nation which has subjects cruising at sea in a vessel that is wholly under their control, which has no national character, and which those subjects are using to make incipient war upon their sovereign, may have rights of prevention which depend not upon territorial but upon personal jurisdiction. Whether those rights can be exercised on the ocean, or only within the territory of the nation that needs to exercise them, depends upon the character of the ocean, upon the practicability of exercising upon it a right of self-defence without interference with the rights of others, and upon the solid reasons why such a right of self-defence should be admitted rather than denied." Mr. Curtis then proceeds to show that the exercise of the right of self-defence has been conceded by civilized states to each other in the case of pirates, the extirpation of whom is referred by him solely to this right. He then cites the somewhat analogous case of slave traders, who may be said in a qualified sense to be enemies of all mankind. And finally, to show the "very great prominence which the law of nations assigns to the right of self-defence," he calls attention to the offence against that law denominated "piratical aggression," which consists in private war by one vessel against another upon the high seas; and in illustration of this he cites the memorable case of the Marianna Flora. He then calls attention to the case of the Caroline, which is within the memory of many of our readers. It is not a little singular that both Mr. Curtis and the writer in the Law Magazine and Review, while discussing at length the diplomatic controversy which grew out of the destruction of the Caroline, should have overlooked or omitted to cite the important case of The People v. McLeod, (1 Hill, N. Y. 377), which grew out of that affair. This case was determined in the Supreme Court of New York in 1841, before Chief Justice NELSON and Justices BRONSON and COWEN, all able and distinguished judges. It is noteworthy in this connection from the fact that Mr. Justice COWEN, who delivered the opinion of the court, attempted to answer the assertion of the British government that the destruction of the Caroline was a necessary act of self-defence.

The facts of the Caroline case were substantially as follows: In the winter of 1837-8, during McKenzie's rebellion in Canada, and while the United States and Great Britain were at peace with each other, a body of armed men, mostly Americans, took possession of Navy Island, in the Niagara river, an island belonging to Great Britain, and, having fortified their position, kept up for several weeks a frequent bombardment against the position occupied by British forces on the Canadian shore. An American steamer, the Caroline, plied regularly between Navy Island and Schlosser, on the American side of the river, furnishing the armed force on the island with supplies and stores, and keeping up a communication between them and the American shore. About midnight of the night of December 29-30, a party of British troops, under command of Colonel Allen McNabb, proceeded in small boats in search of the Caroline, found her fastened to the dock at Schlosser, in the state of New York, made a hostile attack upon her, expelled her crew, set fire to her, and she floated in full blaze over the great falls. In the skirmish, one Amos Durfee, a person employed on the Caroline, was killed, and for his murder, nearly two years afterward, one Alexander McLeod a British subject, was indicted by a grand jury in Niagara county, New York. McLeod having been arrested and confined in jail, the British minister, Mr. Fox, in a note to Mr. Webster, the American secretary of state (March 12, 1841), demanded his immediate release on the ground that the act in which he was engaged was one of a public character, "planned and executed by persons duly empowered by her majesty's colonial authorities to take any steps or to do any acts which might be deemed necessary for the defence of her majesty's territories and for the protection of her majesty's subjects, and that consequently those subjects of her majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the tribunals of any foreign country."

In the meantime McLeod was brought before the Supreme Court of New York, under a writ of *habeas corpus*. Here the prisoner brought to the notice of the court, by affidavits and exhibits, the character of the Caroline, and of the expedition which destroyed her, as well as the demand of the British government for his release.

The case was argued with great ability by counsel, and many precedents and authorities were cited. The judgment of the court was finally pronounced by Mr. Justice COWEN, who argued the question involved at great length, displaying throughout his opinion the clearness of intellect for which he was distinguished, and the exhaustive research which was his habit. Referring to the demand of the British government for the surrender of the prisoner, he said:

"She puts herself, as we have seen, on the law of *defence* and *necessity*; and nothing is better defined, nor more familiar in any system of jurisprudence, than the juncture of circumstances which alone can tolerate the action of that law. A force which the defendant has a right to resist, must itself be within striking distance. It must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. The right of self-defence and the defence of others, standing in certain relations to the defender, depend upon the same ground; at least they are limited by the same principle. It will be sufficient, therefore, to enquire of the right so far as it is strictly personal. All writers concur in the language of Blackstone (3 Black. Com. 4), that to warrant its exertion at all, the defender must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. 'But,' he adds, 'care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the *defender* would himself become the *aggressor*.' The condition upon which this right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition or those limits. The Caroline was not in the act of making an

assault upon the Canadian shore; she was not in a condition to make one; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever he could find her, and were, in fact, obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat. They were the assailants; and their attack might have been legally repelled by Durfee, even to the destruction of their lives."

Further on Mr. Justice COWEN quotes from Puffendorf the rule applicable to cases of private or mixed war, as follows: "If the adversary be a foreigner we may resist him and repel him any way, at the instant he comes violently upon us; but we cannot, without the sovereign's command, either assault him while his mischief is only *in machination*, or revenge ourselves upon him after he hath performed the injury against us." Puff. b. 2, chap. 5, § 7. "The sovereign's command must," adds the learned justice, "in order to warrant such conduct in his subject, be a denunciation of war."

McLeod was accordingly remanded to take his trial in the ordinary course of law, and was tried and acquitted, having proved an *alibi*.

Nothwithstanding the deference which is to be paid to the opinion of so eminent a judge, it is believed that the grounds taken by him, in the language above quoted, are to a great extent fallacious.

1. In the first place it is to be observed that the juncture of circumstances which can alone tolerate the action of the law of self-defence, is by no means as clearly defined—at least in the United States—as the learned justice states it to be. It is true that, on the one hand, we find the rule stated in many cases, that the danger which alone will warrant a person in striking in his defence must be *impending* and about to fall *at the time* the act of defence is resorted to, or, at least, this must be apparent to the comprehension of a reasonable man. (People v. Sullivan, 3 Selden, 396; Harrison v. State, 24 Ala. 67; Creek v. State, 24 Ind. 151; Shorter v. People, 2 Comst. 193; Logue v. Com., 2 Wright, 265; State v. Scott, 4 Ired. 409; Dyson v. State, 26 Miss. 362; Cotton v. State, 31 Miss. 504; Wesley v. State, 37 Miss. 327; Evans v. State, 44 Miss. 762; Head v. State, 44 Miss. 731; Rippy v. State, 2 Head, 217; Williams v. State, 3 Heiskell, 376; Lander v. State, 12 Tex. 462.) These cases state the general rule, and the application of it is, of course, in criminal trials, left to the jury. So, it has been said that the *right of attack for the purpose of defence* does not arise until the person defending has done everything in his power to avoid its necessity. (People v. Sullivan, *supra*; State v. Shippey, 10 Minn. 223.) On the other hand, the doctrine of these last two cases is distinctly repudiated in three cases in Kentucky, where it is held that a person who has once escaped from assassination at the hands of a desperate and persevering enemy, may kill such enemy whenever and wherever he may chance to meet him, so long as such enemy gives evidence that his murderous purpose continues. (Philips v. Com., 2 Duvall, 328; Carico v. Com., 7 Bush, 124; Bohannon v. Com., 8 Bush, 481.) And in three other well-considered judgments, it has been declared that no general rule on the subject applicable to all cases can be laid down, but that each case must depend to a great extent upon its own exigencies. Cotton v. State, *supra*; Patterson v People, 18 Mich. 330, 334; Jackson v. State, Supreme Court Term, 1873.

2. If no settled rule can be laid down in advance which shall determine the exigencies in which a person will be permitted to strike in his private defence, the attempt to apply to a state of private or mixed war, the rules which are supposed to be settled in regard to private defence, must be entirely fallacious. Thus, in a state of civil society, we say, as was said by Mr. Justice COWEN in the case we are considering, that the right to strike in one's defence does not arise while the threatened danger exists *in machination* only; because, at this stage of the danger, it is always possible to appeal to the preventive arm of the law. But a state of war, be it public, private or mixed, brings with it an accumulation of mischief which the civil law is utterly powerless to prevent; and hence, in such cases the defender must be supposed to be remitted to a state of nature in respect of his right of defence; and in a state of nature, where there is no law to which the defender can appeal for prevention, it cannot be possible that he is obliged to sit passively and watch his enemy while he compasses his destruction, instead of attacking that enemy during his work of preparation. The principle laid down by Dr. RUTHERFORTH, as applicable to *defence of life* in a state of nature, would seem to be the reasonable and consistent rule to apply to such cases. He says: "This law [*i. e.*, the law of nature] cannot be supposed to oblige a man to expose his life to such dangers as may be guarded against, and to wait till the danger is just coming upon him, before it allows him to secure himself." But he shows that in state of civil society he is obliged first to appeal to the civil magistrate before he can lawfully strike in defence against a mischief which is only in preparation. Ruth. Inst. b. 1, chap. 16, § 5.

The principles insisted on by Mr. Justice COWEN would have required Col. McNabb to attack the Caroline in his open boats in the middle of the Niagara river, or while moored under the guns of Navy Island, and to capture her, if at all, at a useless expenditure of the lives of his men; and this to satisfy a punctilious rule of supposed law, devised by some casuist in his library!

Applying these views to the case of the Virginius, if the Spanish admiral, though aware of her hostile character, could not, because of her American flag and register, seize her on the high seas, he could not, of course, pursue her into a friendly port and blockade her there; but would be obliged to allow her to steam quietly away, to run into some creek or bay under cover of night, and land her hostile expedition on the territory he was cruising to defend. Such a conclusion is opposed to all our ideas of the right of self-defence.

But if it were practicable to draw any illustrations from the principles of the common law applicable to defence by private persons which would be applicable to public defence against such an expedition as that of the Virginius, we should suppose that Americans would be content to rest the case upon that celebrated declaration of law by Sir MICHAEL FOSTER, which has always been a favorite rule with our jurists. That eminent judge thus laid down the principle of law applicable to defence against *felonious assaults and attempts:* "In the case of justifiable self-defence the injured party may repel force with force, in defence of his person, habitation or property, against one who manifestly intendeth and endeavoreth with violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he findeth himself out of danger; and if, in a conflict between them, he happeneth to kill, such killing is justifiable." Foster Crown Law, 273. This declaration of law has been frequently recognized by English and American jurists, and we believe has never been questioned. (See 1 East P. C. 271–2; Whart. Crim. Law, 7th ed. § 1019; 1 Bish. Crim. Law, 5th ed. § 853; Carroll v. The State, 23 Ala. 28; United States v. Mingo, 2 Curt. C. C. 1; Com. v. Selfridge, 1 Self-Defence Cases, 1; The State v. Thompson, 9 Iowa, 188; The State v. Kennedy, 20 Iowa, 569; The State v. Collins, 32 Iowa, 36; Com. v. Riley & Stewart, Thacher's Crim. Cases, 471; Bohannon v. Com. 8 Bush, Ky. 481; United States v. Wiltberger, 3 Wash. C. C. 515; Pond v. The People, 8 Mich. 150.) Now, applying this rule and the nomenclature of the common law to the case of the Virginius, it cannot be, and never has been, doubted that the persons on board that vessel at the time of her capture "manifestly intended and endeavored with violence or surprise to commit a known felony" against the government and citizens of Spain. At the moment of their being sighted by the Spanish admiral they were "manifestly intending and endeavoring" to land with a cargo of warlike material on the coast of Cuba for the purpose of engaging in private war against the government of Spain and those adhering to it. Viewed according to the common law, the attempt was in the highest degree felonious as to all engaged in it; for private war being *unlawful* and *unauthorized* war, or war waged by one *without jurisdiction*, as Grotius expresses it, it necessarily involves the violent felonies which the common law denominates *murder* and *mayhem*, and generally carries in its train those others which it respectively denominates *rape, robbery, burglary* and *arson*. Besides, all Spanish citizens on board were involved in an attempt to commit *treason*, a crime to which the common law assigns a higher degree and a more heinous dye than to any mere felony. Such being the nature of the attempt, the Spanish admiral might, according to this settled principle of the common law, "repel force by force," nor was he "obliged to retreat," but might lawfully "pursue his adversary" until he found himself, or the territory he was cruising to defend, "out of all danger."

Of course, what is here said has no reference to the summary execution of a portion of those found on board the Virginius, nor does Mr. Curtis or the other two writers to whom we have alluded speak of it except to condemn it. That question is supposed to depend upon other and distinct grounds of law. We may be permitted to suggest, however, that while our government has been swift to demand redress for an insult to its flag which had not been committed, it has been slow to demand reparation for the murder of its citizens by the authorities of Santiago de Cuba. We say *murder*, because it is believed that there can be no law—certainly none that Americans ought to recognize—which can sanction the putting to death by another nation of our citizens found on the high seas, upon the mere supposition, however well grounded it may be, that they *intend* to commit a crime against the municipal laws of such nation and within its territory.

Notes and Queries.

LITTLE ROCK, June 6, 1874.

EDITORS CENTRAL LAW JOURNAL:—Section 9, article 1, of the constitution of Arkansas contains the following provision: * * * "And no person, after having been once acquitted by a jury, for the same offence shall again be put in jeopardy of life or liberty." The constitution of Missouri contains a similar provision. In construing this section our supreme court held (GREGG and MCCLURE dissenting) that "where the indictment

is sufficient in form and substance, and the defendant is arraigned, pleads, and the jury is empanelled and sworn to try the issue," a dismissal of the indictment without the consent of the defendant operates as an acquittal. Lee v. The State, 26 Ark. 260; McKenzie v. The State, ib. 334.

Has the Supreme Court of Missouri ever passed upon this clause in the constitution? Several volumes of the Missouri reports are missing from our library, or I would not trouble you with the question. G.

ANSWER.—We think there is no Missouri case in point. We have been unable to find any.

Legal News and Notes.

—HON. LUTHER S. DIXON, Chief Justice of the Supreme Court of Wisconsin, has resigned. He has held the office for fifteen years, and resigns it now to return to the practice of law, which he expects to find much more lucrative.

—CHIEF JUSTICE AGNEW, Henry W. Williams, of Tioga county, ex-Attorney-General Benjamin Harris Brewster, Hon. William A. Wallace, of Clearfield, Hon. W. H. Playford, of Fayette county, Attorney-General Samuel E. Dimmick, and Hon. A. T. McClintock, have been appointed by Governor Hartranft commissioners to propose amendments to the new constitution of Pennsylvania, under an act of the late legislature.

—IT appears from the preamble of the Tichborne and Doughty estates bill, recently introduced in the British parliament, that the expenses of the litigation occasioned by the claimant's proceedings, and which are payable by the present baronet, or, in the event of his death during minority, by the family, out of the estates, have already amounted to nearly £92,000. These are exclusive of the expenses of the prosecution for perjury, which were borne by the country.

—A CORRESPONDENT writes from Georgia that the bankrupt business in that state is flourishing. Everybody who is indebted seems eager to have all the property in his own possession, and in the possession of his friends, "assured" to himself, through the machinery of the bankrupt court. Our correspondent adds that the bankrupt law in Georgia is, in many respects, akin to the common recovery of old.

—IN the United States Circuit Court, at Portland, Maine, before Mr. Justice CLIFFORD, the case of Bradish Johnson v. Neal Dow was argued a few days ago. This was an action upon a judgment recovered by Johnson, who was a Union man, against Dow, in the sixth district of New Orleans, for sugar, silver spoons, knives, forks and a silver water pitcher, taken by a military expedition sent by Gen. Dow to the plantation of Johnson. The question was whether or not a Louisiana court had jurisdiction in the case.

—GOV. BAXTER, of Arkansas, has made the following apppointments: E. H. English, chief justice, vice John McClure, impeached and suspended; Wm. M. H. Trapon, associate justice, vice M. L. Stephenson, resigned John T. Rearden, F. W. Compton, associate justices, vice Searle and Bennett, impeached and suspended; John J. Clenden, circuit judge, vice John Whytock, resigned; J. C. Davis, circuit judge, vice W. H. S. Clayton, resigned; Robert S. Fuller, circuit judge, vice George A. Kingston, resigned; J. N. Smithee, commissioner of immigration and state lands, vice Wm. H. Gray, impeached and suspended.

—THERE is no divinity that hedges a judge about and protects him from the catastrophes which are liable to befall other men. Some years ago Judge HARRIS, one of the most promising jurists on the supreme bench of Tennessee, lost his life by a steamboat explosion. More recently Judge PECKHAM, of the New York Court of Appeals, found a watery grave with the ill-fated Ville du Havre. And now we are obliged to add to the painful list Hon. CHARLES H. DOOLITTLE, of Utica, New York, one of the justices of the Supreme Court of that state, who was lost at sea from the steamship Abyssinia, on the 21st of May. When his death occurred, he had been at sea but one day, the steamship having sailed on the 20th.

—SENATOR ROZIER recently delivered an argument before the Missouri state board of equalization, which is composed of the members of the state senate, in favor of assessing railroad property for taxation at the same rate at which other property is assessed. While it has been decided by the highest court in the Union that a special tax laid on railroad earnings for the purpose of liquidating the indebtedness of such railroad company to the state is valid, yet the mere mention of the proposition to tax railroad property *for general purposes* at a higher rate *ad valorem* than other property is taxed for like purposes, conveys an idea of injustice so obvious as to shock the conscience; and the fact that it was deemed necessary to make a speech against such a measure of taxation is one of the remarkable signs of the times. To tax one man's property at a higher rate than another's for the same purpose is not a whit better than highway robbery.

—THERE has been a conflict of authority between the civil and military authorities at Salt Lake. To appreciate the difficulty it should be understood that the civil authorities are Mormons. The telegraph states:

"A soldier from Camp Douglas was arrested for disorderly conduct. This morning General Morrow demanded the surrender of the soldier, to be tried by the military authorities. The surrender was refused, and Gen. Morrow ordered Captain Gordon, with a detachment of cavalry, to the city with orders to ask for the surrender of the soldier, and in case of refusal to release him by force. The surrender was refused, and the Captain proceeded to break open the jail and released the man, who is now in confinement at the military post. General Morrow some time since presented the subject of arrests by the civil authorities of soldiers to the war department, claiming that, under the articles of war, soldiers are to be tried by the military, and not by the civil authorities. The judge advocate general of the army approved of this view, and the secretary of war directed General Morrow to act accordingly. No resistance was made by the city authorities. The instructions from Washington in regard to the arrest and detention of soldiers by the Mormon authorities was printed in the papers here a day or two ago, and it is supposed a test case is intended to be made of the occurrence to-day, and that the surrender of the soldier was refused for that reason. The soldiers were cheered loudly by the assemblage of citizens witnessing the release."

—AN interesting suit has been on trial in the Fourth District Court of New Orleans, brought under the Louisiana civil rights law of 1869. The suit was brought by Capt. Peter Josephs, a colored police officer, who purchased a ticket of admission and presented it at the door of a theatre, and was refused admission unless he would consent to go to a part of the theatre other than the dress circle. The act in question gives to all parties a right of action for damages against the keepers of public establishments like hotels, theatres, steamboats, railroads, etc., who have excluded them from the legal enjoyment of the privileges of such establishments on account of race, color, or previous condition. This is the first tried of a number of suits which have been brought under the new law. The ticket expressed on its face the right of the proprietor to exclude the holder at his discretion, and assign him to a certain circle or part of the theatre different from that which he insisted on occupying. The court limited the plaintiff to proofs of breach of contract or claim for damages *ex contractu*. Theatre licenses, under the act in question, express the condition that the holders shall make no distinction of color, race or previous condition in the conduct of his business. Under the rulings of the court the plaintiff can only obtain such damages as he proves he actually incurred.

—THE manner in which the English courts keep the members of their bar in the straight and narrow path is aptly illustrated by what befell a solicitor the other day, as it is related by a leading English journal. If our own courts would be as strict in watching the members of their bar, the standard of the profession in this country would be greatly raised: "A motion was made before the Master of the Rolls to strike Mr. Greenhill off the rolls, on the ground that he had made alterations in an affidavit after it had been sworn. Mr. Greenhill's counsel admitted that he had done wrong, but as it was not done from any corrupt motive, but through excessive zeal for his client, it was hoped the court would not inflict a severe punishment. The Master of the Rolls said Mr. Greenhill was a solicitor of twenty years' standing, and therefore what he had done could not be attributed to want of experience. Although it was a case of excess of zeal, it could not be passed over. The court could not help feeling that Mr. Greenhill had no corrupt motive in making the alteration, but it was made in support of the affirmative of the main issue raised between his client and another party. That was a serious matter; and although he (the Master of the Rolls) did not intend to strike Mr. Greenhill off the roll, yet for the purpose of marking clearly his disapproval of Mr. Greenhill's conduct, he would order that he should be suspended from practicing as a solicitor for six months, and that he should pay the costs of this motion."